

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED
JAN 6 1997
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Implementation of the)
Telecommunications Act of 1996)
)
Amendment of Rules Governing)
Procedures To Be Followed When)
Formal Complaints Are Filed Against)
Common Carriers)
)

CC Docket No. 96-238

DOCKET FILE COPY ORIGINAL

COMMENTS OF
KMC TELECOM, INC.

Russell M. Blau
Melissa B. Rogers
SWIDLER & BERLIN, CHTD.
3000 K Street, N.W., Suite 300
Washington, D.C. 20007
(202) 424-7500
Fax (202) 424-7645

Attorneys for KMC Telecom, Inc.

Dated: January 6, 1997

No. of Copies rec'd. 0+8
List ABCDE

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

**Implementation of the
Telecommunications Act of 1996**

**Amendment of Rules Governing
Procedures To Be Followed When
Formal Complaints Are Filed Against
Common Carriers**

CC Docket No. 96-238

**COMMENTS OF
KMC TELECOM, INC.**

Table of Contents

Introduction and Summary	2
COMMENTS	3
I. Pre-Filing Procedures and Activities (NPRM Part II A, para. 27-29)	3
II. Service (NPRM II B, para. 30- 35)	5
III. Format and Content Requirements (NPRM Part II C, para. 36-46)	7
IV. Answers (NPRM Part II D, para. 47)	10
V. Discovery (NPRM Part II E, para. 48-56)	10
VI. Status Conferences (NPRM Part II F, para. 57-59)	16
VII. Cease, Cease-and-Desist Orders and Other Forms of Interim Relief (NPRM Part II G, para. 60-62)	16

IIX.	Damages (NPRM Part II H, para. 63-69)	17
IX.	Cross-Complaints and Counterclaims (NPRM Part II I, para. 70-71) ..	20
X.	Replies (NPRM Part II J, para. 72-73)	20
XI.	Motions (NPRM Part II K, para. 74-78)	21
XII.	Confidential or Proprietary Information and Materials (NPRM Part II L, para. 79-80)	22
XIII.	Other Required Submissions (NPRM Part II M, para. 80-83)	22
XIV.	Sanctions (NPRM Part II N, para. 84-85)	24
XV.	Other Matters (NPRM Part II O, para. 86-87)	25
CONCLUSION		26
APPENDIX A		27

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

**In the Matter of)
)
Implementation of the)
Telecommunications Act of 1996)
)
Amendment of Rules Governing)
Procedures To Be Followed When)
Formal Complaints Are Filed Against)
Common Carriers)
)**

CC Docket No. 96-238

**COMMENTS OF
KMC TELECOM, INC.**

KMC Telecom, Inc. ("KMC"), by its undersigned counsel, respectfully submits the following comments in response to the Commission's Notice of Proposed Rulemaking (released November 27, 1996) in the above-captioned proceeding.¹

INTRODUCTION AND SUMMARY

KMC supports the Commission's efforts to improve the speed and effectiveness of the formal complaint process by establishing rules to implement the Act's² deadlines for the resolution of complaints against carriers. KMC urges the Commission to establish rules

¹ *In the Matter of Implementation of the Telecommunications Act of 1996, Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers, Notice of Proposed Rulemaking, FCC 96-460, CC Docket No. 96-238 (rel. Nov. 27, 1996) ("Notice" or "NPRM").*

² Telecommunications Act of 1996, Pub. Law No. 104-104, 110 Stat. 56 (1996) ("1996 Act" or "Act")

that provide for rapid resolution of claims while maintaining the fairness and reliability of the complaint resolution process. The Commission's twin goals of establishing a "pro-competitive, de-regulatory national policy framework"³ and of protecting consumers when the market fails to protect them can only be accomplished if carriers and consumers have confidence that the Commission will resolve complaints quickly and fairly. The Commission represents the only forum where justified complaints against carriers may be adjudicated to fulfill the procompetitive aims of the Act without costly litigation and its associated market penalty in time.

COMMENTS

I. Pre-Filing Procedures and Activities (NPRM Part II A, para. 27-29)

KMC supports the Commission's efforts to encourage parties to engage in pre-filing discussions designed to settle disputes or narrow issues. In the NPRM, paragraph 28, the Commission tentatively concludes that, as part of filing a formal complaint, a complainant should be required to certify that it discussed or attempted to discuss the possibility of good faith settlement with the defendant. The Commission further concludes that summary dismissal of the complaint is an appropriate sanction for failing to provide such a certification.

KMC supports the Commission's recommendations and urges the Commission to adopt a rule imposing a similar requirement on defendants. Pre-filing discussions will

³ S. Conf. Rep. No. 230, 104th Cong., 2nd Sess. 1 (1996) ("Joint Explanatory Statement").

result in successful settlement or resolution of disputes and a concurrent decrease in the number of complaints filed with the Commission only if both parties are required to participate in those discussions. Accordingly, the Commission should require a defendant to certify in its answer that it participated in good faith settlement discussions with the complainant. Failure by a defendant to so certify should result in the answer being stricken from the record.⁴

In paragraph 29, the Commission seeks comment on whether a committee of neutral industry experts would serve a needed or useful role in addressing disputes involving technical issues. The term "neutral industry expert" is an oxymoron. Any expert in the industry has vested interest in certain ideas and concepts that will influence his expert opinion. KMC believes that involving a committee of "neutral industry experts" during the pre-filing stage of the formal complaint procedure will be unworkable. Potential conflicts of interest together with likely reluctance of most carriers to share confidential and proprietary information with members of the industry -- regardless of guarantees of confidentiality -- would outweigh the marginal benefit gained in resolving disputes over technical issues.

Experts could be used within the formal complaint procedure in appropriate cases. If, after review of initial pleadings, the parties or the Commission staff believe that expert assistance would be necessary or helpful to the resolution of technical factual disputes, the

⁴ Text of proposed rule in Appendix A (See §1.724(j)).

mechanism for obtaining expert assistance can be discussed at the initial status conference. Such a procedure limits the use of experts to cases in which expertise is necessary or beneficial to the resolution of the complaint.

One possible method of choosing an expert to assist the Commission could be for the staff to compile a list of 10 experts available to consult on the case. The list could then be submitted to the parties. The parties would each rank the experts on a scale of 1 to 10 (1=most desirable; 10=least desirable). The rankings could then be submitted to the Commission. The Commission could appoint the first expert that both parties agree to. For example, if the parties both rank the same expert as 3, that expert would be appointed. The American Arbitration Association uses a similar procedure for appointing arbitrators in certain types of cases.

II. Service (NPRM II B, para. 30- 35)

KMC urges the Commission to adopt rules requiring a complainant to serve the defendant carrier, the Commission's secretary and the Chief of the division or branch responsible for handling the complaint simultaneously. Complaints should include appended certificates of service certifying simultaneous filing and service on the carrier. In conjunction with these rules, the Commission should establish and maintain an electronic directory -- available on the Internet -- (1) of agents authorized to receive service of complaint on behalf of carriers that are subject to the provisions of the Act, and (2) of the

relevant Commission personnel who must be served. In combination, these measures will increase the speed and efficiency of service.

KMC proposes that the electronic database include the following information on authorized agents: name, address, telephone number, facsimile number and e-mail address. The Commission should require carriers to provide updated information within five (5) business days following any change. Nonetheless, a carrier cannot be permitted to escape service of a complaint because it failed to provide accurate information to the Commission. Therefore, service on the agent listed as the authorized agent in the Commission's electronic database should constitute effective service, even if the carrier has changed agents. Such a rule provides carriers with an incentive for updating information.⁵

KMC also supports the Commission's proposal requiring complainants to file a completed Formal Complaint Intake Form with the complaint. The proposed form is simple to complete, and like civil cover sheets required by federal district courts, allows Commission staff and defendants to identify the parties involved and the relevant statutory provisions at issue.

KMC urges the Commission to require that all pleadings subsequent to the complaint be served by facsimile or Internet e-mail. Service by facsimile or e-mail eliminates the lag time in service by mail and is ecologically sound. If the Commission

⁵ Text of proposed rule in Appendix A (See §1.47(h)).

adopts a rule requiring service by overnight mail or delivery service, facsimile service should not be required. Duplicative forms of service merely waste time and resources and serve no purpose. KMC also urges that the Commission require all pleadings to be accompanied by a certificate of service certifying the date and method of service of the pleading on the other party. This rule parallels a requirement in the Federal Rules of Civil Procedure. Fed.R.Civ.P. 5. Service by mail or overnight delivery should be complete upon mailing or delivery to the courier service.

III. Format and Content Requirements (NPRM Part II C, para. 36-46)

KMC agrees that the utility and quality of the complaint, answer and other filings must be improved to allow resolution of formal complaints within the Act's complaint resolution deadlines. In adopting modified requirements for pleadings, the Commission must be careful not to limit a complainant's ability to bring or pursue an action by limiting the opportunity to develop a case and to obtain information. Parties must be permitted a full and fair opportunity to develop their cases factually and legally.

KMC urges the Commission to continue to permit complainants to make allegations based on "information and belief." Complainants should not be prevented from bringing a complaint merely because some of the information is within the sole possession, custody and control of other party. Although parties are required to discuss settlement pre-filing, there is no requirement of an early exchange of information. Thus, parties can engage in good faith settlement discussions without obtaining sufficient facts to plead a claim.

Prohibiting allegations based on "information and belief" will unduly inhibit a complainant's ability to present claims of unlawful behavior against carriers under the Act. Moreover, small business and individuals would be disproportionately prejudiced by prohibiting allegations based on "information and belief." These parties have fewer resources available to invest in the initial investigation of a claim.

In paragraph 43, the Commission proposes that the complaint, answer and any authorized reply include two sets of additional information: (1) the name, address and telephone number of each individual likely to have discoverable relevant factual information and the subjects of that information, and (2) a copy of, or description by category and location of all relevant documents, data compilations and tangible things in the possession, custody, or control of the party.

KMC urges the Commission to adopt required early disclosure of information. KMC supports the Commission's proposal to require disclosure of the names and identifying information of persons with information. The Commission should clarify that parties should be required to provide the *business* address and telephone number of these persons where available or their last known whereabouts or address.

As part of the initial disclosure, parties should provide a description of relevant documents. Requiring parties to serve and/or file copies of documents with initial pleadings would result in thousands of documents being copied unnecessarily. Many of the documents identified by parties in initial disclosures have little or no relevance to the

dispute. Parties must be enjoined to arrange to review documents and copy only specified documents. This procedure results in fewer unnecessary copies and reduces the adverse ecological and economic consequences of copying, filing and serving thousands of documents.

KMC acknowledges that the revised form and content requirements for filing a formal complaint will require the expenditure of time and resources that may not be available to individuals and small businesses. Therefore, KMC agrees that the Commission should waive certain of the form and content requirements upon a showing of "good cause." Nonetheless, some minimum standard must be maintained. At a minimum, complainants should be required to: (1) certify that good faith settlement has been discussed, (2) provide sufficient detail in the complaint for a defendant to answer, and (3) provide sufficient identifying information to allow the defendant to serve papers on the complainant. Complying with the certification requirement requires little time and resources. Moreover, by maintaining the certification requirement for all complaints, the Commission will be encouraging early settlement discussions.

KMC believes that carriers receiving complaints have a right to understand the allegations against them and be given a meaningful opportunity to respond. Accordingly, in cases where the Commission waives form and content requirements, defendants must be permitted to file motions requesting that the allegations in the complaint be made more definite and certain. In the alternative, the Commission could establish a procedure to

review complaints filed by unrepresented parties to determine if additional detail is necessary before the defendant is required to answer.

Finally, the Commission should require that "good cause" be pled in the initial complaint. In other words, a complainant should be required to demonstrate that "good cause" exists for waiver of form and content requirements on the face of the complaint. In the alternative, the Commission could establish a form to be filled out by the complainant requesting a waiver of form and content requirements. The complainant could provide a brief explanation on the form of the requirements sought to be waived and the reasons for the requested waiver. Similar forms are used by some courts when persons are filing *in forma pauperis* and/or are seeking waiver of filing fees. The forms require a brief statement of the party's assets and contain a statement to be signed under penalty of perjury that the party lacks sufficient funds to comply with ordinary filing requirements. Requiring a complainant to complete such a form is a simple method of ensuring that only a party actually in need of a waiver of the pleading requirements, receives one.

IV. Answers (NPRM Part II D, para. 47)

KMC urges the Commission to reduce the time for filing an answer to a complaint to 20 days after service or receipt of the complaint. KMC believes that shortening this deadline will expedite the formal complaint procedure without any prejudice to the parties.

Under the Federal Rules of Civil Procedure, parties must answer a complaint 20 days after service⁶ and most parties easily comply with that deadline.

V. Discovery (NPRM Part II E, para. 48-56)

KMC agrees that discovery disputes are often "the most contentious and protracted component of the formal complaint process." NPRM, ¶49. Nonetheless, the wholesale elimination of discovery would unduly prejudice the rights of all parties involved in the formal complaint process. Elimination of discovery would limit parties' ability to develop facts to support claims and defenses. Parties would be litigating in a vacuum, unaware of potentially critical information. The reliability and fairness of any decision rendered in that process would be subject to question. Moreover, the elimination of discovery could well result in parties making more motions seeking discovery, thereby increasing the burden on Commission staff and the time for completion of discovery.

Discovery must be tailored to eliminate as many disputes as possible while still permitting the parties access to crucial information. KMC urges the Commission to prohibit the use of interrogatories as a method of discovery. Responses to interrogatories are drafted by counsel and often provide no useful information.

In addition to the requirement that parties exchange lists of persons with knowledge and descriptions of relevant documents, KMC proposes that parties be required to meet and confer after the filing of the answer and before the first status conference to discuss

⁶ Federal Rule of Civil Procedure 12(a)(1)(A).

certain specified issues, including discovery. Meet and confer conferences are required by the United States District Court for the District of Columbia.⁷ Such conferences require the parties to meet and attempt to reach agreement on a number of issues, including discovery. Any agreements reached during the meet and confer must be reduced to joint consent orders that can be entered by staff at the first status conference. Any disputes between parties should be reduced to writing and submitted to the staff at the first status conference for resolution.

If possible, the meet and confer should be in person. The parties must discuss the following issues:

- if discovery beyond exchange of documents and identity of persons with knowledge is necessary. If the parties believe that additional discovery is necessary, they should identify what discovery is needed;
- if depositions or submission of affidavits are necessary. If the parties agree that depositions will be needed, they should agree to the number of depositions, the identity of the deponents and proposed dates for depositions;
- the timetable for completion of all discovery;
- the need or desirability of referring technical disputes to a neutral expert;
- if, based on the information contained in the complaint and answer, there is a realistic possibility of settling the case;
- if briefing is necessary, or if the case can be decided based on the pleadings;

⁷ Rule 206, Rules of the United States District Court for the District of Columbia.

- if the parties are willing to refer certain factual issues to an administrative law judge for resolution;
- if the parties are willing to utilize alternative dispute resolution instead of proceeding through formal complaint proceedings;
- if parties are willing to agree to bifurcate liability and damages phase in cases where the complainant has not already opted for bifurcation;
- disagreements, if any, over whether documents should be designated as confidential or proprietary;
- in Section 271(d) cases, whether parties can agree to extend or waive the 90-day resolution deadline;
- draft joint stipulation of stipulated facts and key legal issues.

If the parties cannot agree on issues, they should draft a short joint statement to present to staff outlining the disputes, each party's position, and proposed resolutions. At the initial status conference, the parties should be prepared to inform staff of the outcome of agreements reached or disputes that arose during the meet and confer. Staff can resolve the disputes between parties, and establish a timetable for completion of discovery and establish a briefing schedule.⁸

KMC urges the Commission to abandon any proposal to require parties to file the documents identified in the initial disclosures with the Commission. Such a requirement would result in millions of documents being copied unnecessarily. This influx of documents would be an administrative nightmare for the Commission and the parties. KMC urges the

⁸ KMC is attaching the text of a proposed rule regarding the "meet and confer" requirement in Appendix A hereto (See new §1.730).

Commission to adopt a rule requiring that parties exchange descriptions of relevant documents. The parties should then review the documents and copy only designated documents.

KMC urges the Commission to encourage parties to enter into voluntary cost-recovery systems as a mechanism to facilitate prompt exchange of information as proposed in paragraph 54. Many parties agree to such systems now.

KMC agrees that the shortened deadlines require voluntary compliance with discovery rules. Parties must engage in good faith efforts to resolve discovery disputes and to comply with the rules of the Commission. Failure to comply with basic discovery rules jeopardizes the functioning of the complaint resolution process. Therefore, sanctions for failure to comply are appropriate.

KMC agrees that the Commission should utilize the entire panoply of sanctions available. The Commission, however, should grant summary dismissal or deny relief as a sanction for failure to comply with discovery rules only in the most egregious cases. These cases should be rare. For example, a party must have the right to oppose a motion to compel if such opposition is in good faith and founded on an arguable legal basis. Accordingly, KMC urges the Commission to adopt a rule whereby the Commission would enter a show cause order three days prior to sanctioning a party for failure to comply with a discovery rule. The show cause order would state the sanction that will be imposed if the party does not comply with the discovery order within three days. This process gives a

party a last chance to comply with the discovery rule prior to facing summary dismissal or denial of requested relief.⁹

In paragraph 56, the Commission proposes to amend its rules to authorize the Common Carrier Bureau, on its own motion, to refer factual disputes to an administrative law judge ("ALJ") for an expedited hearing. KMC urges the Commission to adopt such a rule. Such a procedure would facilitate faster resolution of complaints filed against carriers. KMC also believes that as part of the proposed meet and confer, the parties could discuss what, if any, factual issues should be referred to an ALJ for resolution.

There, however, must be clarification of the procedures for making such a referral. For instance, will only certain factual issues be referred to the ALJ or will an entire controversy be referred with a blanket instruction for the ALJ to resolve all outstanding factual issues? Referring only designated issues to an ALJ could result in piece-meal resolution and litigation of key issues. Referring the entire controversy to the ALJ, however, could result in duplicative briefing before the ALJ and later, before the Commission. Moreover, it is unclear whether there would be a right to appeal factual determinations to the Commission.¹⁰ If such appeal rights exist, the interjection of an ALJ

⁹ Text of proposed rule in Appendix A (See New §1.731A).

¹⁰ Parties must have a right to appeal an ALJ's rulings on factual issues. Such appeals, however, must be on very limited grounds. For example, an ALJ's rulings on factual issues should be overturned only if (1) there was evident partiality of the ALJ or corruption or misconduct prejudicing the rights of any party; (2) the ALJ exceeded his authority by resolving factual issues not referred to him and the resolution of those issues adversely affected the appealing party; or (3) the ALJ refused to hear evidence

into the formal complaint process could actually increase the time for resolving the complaint.

VI. Status Conferences (NPRM Part II F, para. 57-59)

KMC supports the Commission's proposal to require that a status conference be held 10 business days after defendant files its answer. In interim, KMC proposes that the parties be required to meet and confer. The meet and confer rule will force parties to focus on areas of agreement and disagreement. Thus, the initial status conference can be used to resolve disputes between parties. The meet and confer and the initial status conference will result in settlement of more cases or a narrowing of issues in dispute thereby reducing litigation costs.

KMC urges the Commission to require staff to memorialize oral rulings made in status conferences. If the Commission adopts KMC's proposed meet and confer rule, the parties should be prepared to present joint orders, position statements on disputed issues and a joint stipulation of facts and key legal issues at the status conference. Therefore, the parties should be able to submit joint proposed orders for any rulings made during the conference within 24 hours. KMC also urges the Commission to adopt a rule that will encourage parties to tape record the Commission's summary of its oral rulings. KMC does not believe that a stenographer is necessary or cost-effective alternative.

material to the controversy. Such limited grounds for appeal protect parties' rights, but cut down on frivolous appeals of factual determinations.

VII. Cease, Cease-and-Desist Orders and Other Forms of Interim Relief (NPRM Part II G, para. 60-62)

In paragraph 60, the Commission tentatively concludes that the show cause hearing requirement contained in Section 312 does not apply to Section 208 and related complaint proceedings, even if the proceedings lead to cease-and-desist orders. KMC agrees with the Commission's conclusion. The short deadlines in Section 208 do not allow sufficient time for extraneous hearings, including show cause hearings.

KMC urges the Commission to adopt the standard used by courts in granting interim relief as the standard for granting cease orders, cease-and-desist orders and other interim relief. KMC also encourages the Commission to adopt a rule that permits the Commission to require the posting of a bond or other security in certain cases prior to granting interim relief.

IIX. Damages (NPRM Part II H, para. 63-69)

KMC supports the Commission's proposal encouraging complainants to bifurcate the liability and damages phases of the formal complaint process through the use of the supplemental complaint rules. Damages calculations are often complex and require targeted discovery. Parties spend much of their time and effort in discovery and briefing on the damages aspect of the case. By bifurcating the proceedings, the Commission and the parties can focus on the liability aspect of the case. If there is a finding of no liability, the time and resources that otherwise would have been spent on damages will be saved.

Moreover, bifurcation will reduce the number and complexity of issues that must be decided within the statutory deadlines.

KMC urges the Commission to adopt rules that encourage bifurcation of formal complaint proceedings, but do not require them. KMC believes that complainants have the right to have all issues related to their complaints resolved in a single proceeding. KMC believes that many complainants will opt for the supplemental complaint procedure particularly in cases involving complex damages calculations. In less complex cases, complainants should be able to have all issues resolved together.

KMC believes that bifurcation is a sensible alternative that can save the parties and the Commission time and effort. Therefore, KMC has included bifurcation as an issue to be discussed by the parties at the meet and confer.

KMC supports the Commission's proposal in paragraph 66 to adopt a rule requiring a complaint seeking an award of damages to contain a detailed computation of damages. The complaint should state the amount of damages, provide an explanation of the damages calculation and identify documents relied on in making the calculation. KMC recognizes that damages' calculations are complex and parties often disagree on the proper method of performing the calculation. Nonetheless, resolution of these issues will be furthered if the parties understand the opponent's method of calculating damages.

KMC believes that requiring the parties to agree on the amount of damages is unworkable. The possibility for disagreement is endless. Moreover, KMC strongly

believes that parties are entitled to a Commission determination of substantive issues, including damages.

KMC supports the adoption of a rule that provides for a limited time between the bifurcated liability and damages phases of a case to encourage settlement. During the hiatus, the parties should be required to utilize alternative dispute resolution mechanisms to resolve the damages issues.

In addition, the Commission should be permitted to refer the resolution of the damages issue in complex cases to an administrative law judge. Damages hearings can often be long and complex. An administrative law judge can give the damages case the time and effort that is needed. KMC believes that there must be some appeal right for parties to challenge an ALJ's ruling on limited grounds. See, supra., footnote 10.

KMC believes that in bifurcated proceedings, after a finding of liability, the Commission should be permitted to require a defendant to post a bond or to place monies into an interest-bearing account to cover part or all of the damages. KMC does not believe that all of the standards necessary for obtaining a preliminary injunction must be met before requiring payment. After all, the Commission will be requiring payment only after a finding of liability. In most cases, the damages phase will involve the calculation of the appropriate amount of damages, not complainant's entitlement to damages. Therefore, the Commission should require a defendant to pay damages on: (1) a showing of irreparable harm, or (2) a showing that there is a likelihood that defendant will default on

the damages award. Irreparable harm is shown if (1) the defendant has failed to make payments on judgments in the past; (2) the defendant is filing or has filed bankruptcy; (3) the defendant is insolvent; or (4) the defendant has indicated that it will not make the payment. Partial payment to the Commission in escrow might eliminate wasteful appeals if the amount required to post a bond is substantial.

A complainant that has chosen to bifurcate proceedings must be guaranteed effective and meaningful protection pending resolution of damages.

IX. Cross-Complaints and Counterclaims (NPRM Part II I, para. 70-71)

KMC encourages the Commission to adopt a rule that requires defendants to bring all counterclaims and/or cross-claims at the time of filing the answer. By the time the answer must be filed, defendants should be aware of any compulsory counterclaims that must be brought. Nonetheless, this rule is equitable only if parties are permitted to plead upon "information and belief." Defendants might not have all of the facts necessary to plead a compulsory counterclaim at the time of filing the answer. If failure to plead such a claim with the answer results in the claim being barred, defendants must be given an opportunity to plead on "information and belief" and to develop their case during the discovery process.

X. Replies (NPRM Part II J, para. 72-73)

KMC agrees that replies to answers should be barred. Again, this rule is equitable only if the Commission deems the complainant to deny all allegations relating to affirmative

defenses pled by the defendant. Moreover, in cases where there is a counterclaim or cross-claim, a complainant must be permitted to answer those claims.

KMC also agrees that replies to motions should, as a rule, be barred. However, KMC proposes that a reply be permitted upon a showing that the opposition to the motion raised issues not addressed in the initial motion. Although oppositions should be limited to issues raised in the original motion, parties often raise other issues in the opposition. In those cases, a reply limited to newly raised issues should be permitted.

XI. Motions (NPRM Part II K, para. 74-78)

KMC agrees with the Commission's goal of reducing unnecessary motions. KMC believes that the Commission should adopt a rule requiring parties to certify that they made a good faith attempt to resolve discovery disputes before filing a motion to compel.

KMC suggests an alternative to filing motions to compel. After the parties make a good faith attempt to resolve any disputes, the parties could arrange a joint conference call with Commission staff. At this conference call, the parties could present their respective positions orally to the staff. The staff could then rule on any discovery dispute. If the staff determines that legal briefing of the issues is necessary, a briefing schedule could be entered. This would eliminate the need for most motions to compel.¹¹ If a party refuses to engage in discussions with the other party, the moving party would retain the right to file

¹¹ Text of proposed rule in Appendix A (See § 1.729(f)).

a motion to compel. That motion must contain certification of the dates and times that the movant attempted to contact the non-movant, and the non-movant's response, if any.

KMC urges the Commission to adopt a rule that failure to file an opposition can be grounds for granting a motion. The Commission's proposed rules all but eliminate the need for motions. Parties are encouraged to meet and attempt to resolve most disputes. Therefore, motions should only be necessary in the rare cases where the parties are unable to reach agreement, and in these cases it is not unreasonable to require the filing of an opposition.¹²

XII. Confidential or Proprietary Information and Materials (NPRM Part II L, para. 79-80)

KMC supports the Commission's revision of rules to permit parties to designate as proprietary any materials generated in the course of a formal complaint procedure. Documents and information are routinely generated during the formal complaint procedure. Certain of this information, including damages calculations, could be considered confidential and/or could be based on confidential information. By permitting a party to designate such information as proprietary, the Commission is encouraging parties to exchange that information without fear of it being publicly disseminated.

¹² If an opposing party is not represented by counsel, the party filing the motion should be required to include on the cover page of the motion a notice that failure to file an opposition may be grounds for the Commission to grant the motion.

XIII. Other Required Submissions (NPRM Part II M, para. 80-83)

KMC supports the Commission's proposal requiring parties to submit a joint statement of stipulated facts and key legal issues. KMC proposes that the parties discuss such a statement at the meet and confer conference. Such a statement can be drafted by the parties and submitted during the first status conference. Although KMC's proposal would give the parties five additional days to draft the joint statement, KMC believes that the meet and confer requirement -- covering discovery issues as well as the stipulations -- will facilitate faster resolution of complaints overall.

KMC believes that the wholesale elimination of legal briefing in cases not involving discovery would be highly prejudicial to the parties. Parties must be permitted to review the opponent's pleadings and the joint stipulation of facts and key legal issues before being required to submit proposed findings of fact and legal analysis. Without an opportunity to review the opponent's position, findings of facts and conclusions of law would be of limited use. Moreover, the burden of adequately researching issues could fall on the Commission staff, increasing the effort required to resolve complaints. Although KMC does not support the elimination of briefing in all cases, it recognizes that in some cases, briefing is unnecessary. The parties may be able to agree to submit the case on the pleadings without briefs. Therefore, KMC proposes that the parties be required to discuss whether the case can be submitted on the pleadings at the meet and confer.